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No. 190

In the Supreme Court of the United States

October Term, 1949.

GLEN S. DILLE, *Petitioner*,

vs.

W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

RESPONSE AND BRIEF OF W. A. DELANEY, JR., AND ZEPHYR DRILLING COMPANY, RESPONDENTS.

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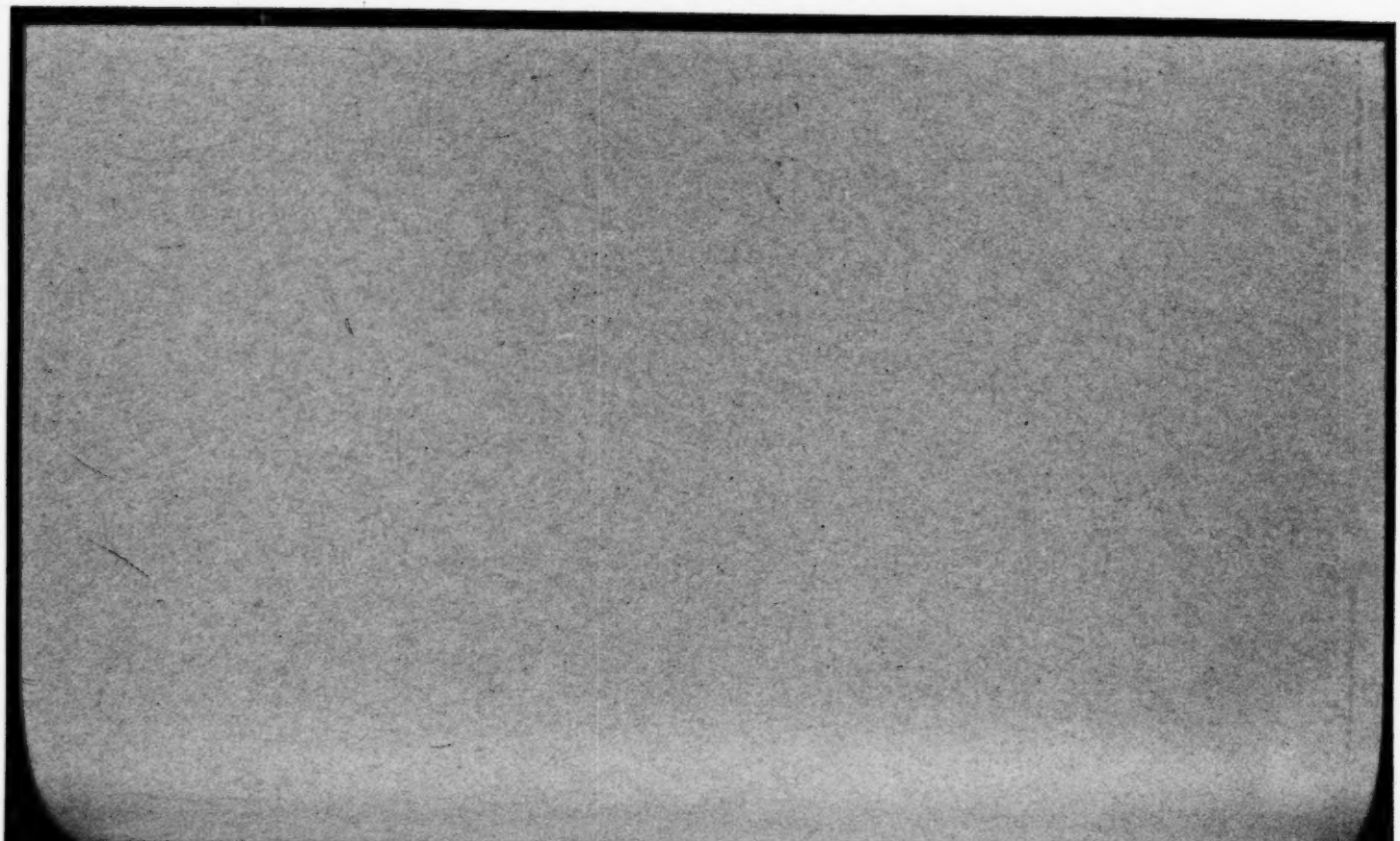

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IN THE SUPREME COURT OF THE UNITED STATES.
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W. A. DELANEY, JR., ZEPHYR DRILLING COMPANY, A CORPORATION, AND THE CARTER OIL COMPANY, A CORPORATION,

Respondents.

RESPONSE AND BRIEF OF W. A. DELANEY, JR., AND ZEPHYR DRILLING COMPANY, RESPONDENTS.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

May It Please the Court:

The respondents, W. A. Delaney, Jr., and Zephyr Drilling Company, a corporation, herewith present their response to the petition for writ of certiorari of Glen S. Dille filed in the above styled and numbered cause.

I.

Statement of Matter Involved.

The statement of the petitioner is incomplete and this statement of the case is offered to supply omissions. The

decision of the court below turned upon the allegations of the complaint and a full statement of them is necessary.

Carter's complaint (R. 3 to 8) alleges: On March 5, 1946, it entered into a contract with these respondents to acquire a 60% ownership of certain oil and gas leases for a consideration of $25,000.00 and the drilling of an exploratory well subject to examination and approval of titles. From an examination of abstracts and muniments of title Carter ascertained that the record title to the leases was in these respondents and the contract of purchase was consummated. The contract appears as Exhibit A, pages 8 to 15 of the record. It contains not only the agreement to purchase but also provisions for the development and operation of the leases by Carter. It provides for distribution of costs and expenses, conditions under which Carter is authorized to incur expenses, and when and under what circumstances the assent of Delaney and Zephyr must be obtained for proposed expenditures (R. 10 to 12). It provides that Delaney and Zephyr shall have certain specific rights of inspection, examination and audit (R. 12 and 13). Carter is given the right to purchase all production subject to the right of Delaney and Zephyr upon notice to receive their proportionate parts in kind or separately to dispose of the same (R. 13). The operation of the leaseholds is placed in Carter with full powers of control and management except the consent of Delaney and Zephyr must be obtained for the drilling of any wells other than necessary off-sets. (R. 11) The agreement clearly contemplates the development and operation of all of the leaseholds as a whole in one joint adventure. The basis of the agreement was the representation by Delaney and Zephyr that they owned the leases involved (R. 8 to 9 and 17). Exhibit B to the complaint (R. 19 to 29) is a detailed agreement as to accounting

procedure to be followed by the parties ancillary to the performance of the principal contract.

It is alleged that Dille has filed an action in the District Court of Garvin County, Oklahoma, against Delaney and Zephyr to establish a joint adventure or partnership between them under which Dille would be the owner of an undivided one-third interest in the leases and for the partition of leases in kind accordingly.

The complaint alleges Carter entered into the performance of the agreement; that it expended $98,171.00 in drilling the first well; that up to the time of filing its action it had drilled nineteen wells at the cost of approximately $1,000,000.00 for drilling and equipment (R. 4 and 5), all of which was without any notice of claim by Dille. It alleges that the leases have not been fully developed and may require further exploration; that as of the date of the commencement of its action the leases were producing oil at the rate of $156,677.50 per month; that the interest claimed by Dille amounts to more than $30,000.00 per month and in the disbursement of that sum Carter is subject to a hazard and risk to which it should not be liable. (R. 6)

The complaint further alleges that the agreement impliedly prohibits partition of the leaseholds in kind and that Carter cannot proceed with the performance of its obligations under the agreement without a determination of the rights of the defendants therein; that it must know what persons have the right to approve the drilling of new wells, and to approve expenditures in excess of $3,000.00; to what persons and in what proportions the costs of operation should be charged and to whom and in what proportions the income should be distributed. (R. 6 and 7)

The complaint further alleges that, if Dille has any

interest in the leaseholds, Delaney and Zephyr had the right to and did bind him and his interest by their execution of the contract (R. 6 and 7).

The relief sought is: (*1*) That the contract be declared binding upon Dille, Delaney and Zephyr; (*2*) that none of them may have partition; (*3*) that the proportionate share owned by each of the defendants be determined; and (4) that the contract be construed to vest in Delaney and Zephyr alone the right to give consents to drilling additional wells and making expenditures. (R. 7 and 8)

The action was filed May 28, 1948. On June 30, 1948, Delaney filed his answer and cross-claim (R. 31 to 34). Delaney admits the execution of the contract but denies that he executed it for and on behalf of Dille. He states he does not have sufficient information as to the costs and expenses set up by Carter. For cross claim against Dille, Delaney asserts that Dille has no interest whatever in the leaseholds; that no partnership or joint agreement existed between them, that he had no notice of any right or claim of Dille at the time of his acquisition of the leases. Delaney asks judgment declaring (*1*) that no partnership or joint adventure exists between him and Dille; (*2*) that Delaney acquired his interests without notice of any claim by Dille; (*3*) that Dille is estopped to assert any such claim as against Delaney; and (*4*) that Carter pay to Delaney his proportionate part of any sums due under the contract without diminution by reason of Dille's claim.

On July 13, 1948, Zephyr filed its amended answer, counterclaim against Carter and cross-claim against Dille. (R. 38 to 41) Its answer is substantially the same as Delaney's. Its counterclaim against Carter seeks judgment directing Carter to recognize Zephyr's interest under the contract and to pay Zephyr 20% of the income from the

properties. Its cross-claim against Dille denies the existence of a partnership or joint adventure, denies that Dille has any interest in the leases whatsoever and seeks judgment accordingly.

On July 6, 1948, Dille filed his motion to dismiss (R. 36 and 37) on the ground that no controversy existed between the plaintiff and any of the defendants, that the only controversy existed between Dille and his co-defendants, Delaney and Zephyr, and that, since all the defendants were residents of Oklahoma, there was no justiciable controversy between citizens of different states. The motion also stated that the defendant Dille had offered and was then prepared to give a written statement to the Carter that no claim adverse to the Carter was asserted by the defendant Dille. It is important to note here that although such offer was made, and a stipulation prepared by Carter and presented to the defendant Dille, the latter refused to execute it. (R. 41, 59-60, 135-136)

A hearing was held on the motion to dismiss on July 16, 1948 (R. 41 to 60). Briefs were filed and on September 16, 1948, the motion came on for final disposition (R. 128 to 143). Upon admissions, waivers and agreements made at that time by Dille and his counsel, the trial court found no justiciable controversy existed between Carter and Dille and dismissed the action together with the counter-claim and cross-claims of Zephyr and Delaney. (R. 143 to 145)

On appeal the Court of Appeals for the Tenth Circuit held: (*1*) that the jurisdiction of the trial court must be governed by the allegations of the complaint whether those allegations are well founded or not; (*2*) that the complaint stated a claim for declaratory relief; (*3*) that jurisdiction cannot be denied upon ascertainment of facts which go to the merits of the action; and (*4*) that Delaney and Zephyr

had a direct, immediate, substantial interest in the subject-matter of the action and the right to appeal from the order of dismissal.

II.

Jurisdiction.

This Court has jurisdiction to review the decision of the Court of Appeals by certiorari. However, the decision is not one coming within any of the grounds enumerated in Rule 38, subsection 4(b). The questions presented do not appear to have either the gravity or importance usually required for granting a writ of certiorari nor is uniformity of decision involved.

III.

Questions Presented.

We cannot agree that the question presented by the record is that stated in the petition. It is clear from the record and the decision of both the trial court and the Court of Appeals that the questions considered and decided were: *First,* did the complaint state a cause of action; *second,* did the admissions, waivers and agreements made by Dille and his counsel establish the legal insufficiency of the complaint and the non-existence of a justiciable controversy; and, *third,* did the respondents Delaney and Zephyr have a right of appeal from the order of dismissal. The matter should be considered here on the points which determined the decisions below.

IV.

The Writ Should Be Denied.

In so far as the petition may present the constitutional question that under Article 3, Section 2, Clause 1, the courts of the United States may not entertain an action for de-

claratory relief, the matter has been settled. *Aetna Life Insurance Company* v. *Haworth,* (1937) 300 U. S. 227, 57 S. Ct. 461, 81 L. ed. 617.

The petitioner is not entitled to the writ as a matter of right but it lies in this Court's discretion.

Ordinarily, writs of certiorari will be allowed only to resolve a conflict of decisions between the several Courts of Appeal or where the question is of such importance that it is in the public interest to have it decided by the court of last resort. *Magnum Import Company* v. *Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. ed. 922 (1923); *Lau Ow Bew* v. *United States,* 144 U. S. 47, 12 S. Ct. 517, 36 L. ed. 340 (1892).

To the extent that the decisions of the courts below were reached upon questions of fact, certiorari will not ordinarily be granted for a review here. *National Labor Relations Board* v. *Waterman S. S. Corporation,* 309 U. S. 206, 60 S. Ct. 493, 84 L. ed. 704 (1940); *General Talking Pictures Corporation* v. *Western Electric Company,* 304 U. S. 175, 546, 58 S. Ct. 849, 82 L. ed. 1273 (1938); *Southern Power Company* v. *North Carolina Public Service Company,* 263 U. S. 508, 44 S. Ct. 164, 68 L. ed. 413 (1924).

The action of the Court of Appeals for which review is here sought is not a final decision. Except in extraordinary cases, the writ will not issue until after final judgment. This is not shown to be an extraordinary case. *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Company,* 240 U. S. 251, 258, 36 S. Ct. 269, 271, 60 L. ed. 629, 633 (1916); *American Construction Company* v. *Jacksonville T. & K. W. R. Co.,* 148 U. S. 372, 378, 384, 13 S. Ct. 758, 37 L. ed. 486, 489, 491 (1893); *The Three Friends,* 166 U. S. 1, 49, 17 S. Ct. 495, 41 L. ed. 897, 913 (1897); *The Conquerer,* 166 U. S. 110, 113, 17 S. Ct. 510, 41 L. ed. 937, 939 (1897); *Denver* v. *New York Trust Company,* 229 U. S. 123, 133, 33 S. Ct. 657, 57 L. ed.

1101, 1120 (1913); *John Simmons Company* v. *Grier Brothers Company*, 258 U. S. 82, 91, 42 S. Ct. 196, 66 L. ed. 475, 480 (1922).

Conflict of decisions among the Courts of Appeal has not been shown and petitioner does not point out either the importance of the question or any public interest therein.

Nor is the decision in conflict with the decisions of this Court. In *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 62 S. Ct. 15, 86 L. ed. 47, (1941) the subject-matter of the action was a lease contract to which the plaintiff was not a party. The plaintiff sought by its action to have that contract declared binding on the City of Indianapolis as the successor in title of the original lessee. The Chase Bank's only interest in the property leased was that of trustee under a mortgage deed executed prior to the lease. The Chase Bank and the lessor both asserted the lease was binding on the City. This assertion the City denied. This Court held the parties must be re-aligned and the resulting loss of diversity required dismissal.

In the case at bar, Carter contends that a contract to which it is a party is binding on Dille. Delaney and Zephyr both deny that Dille has any interest in the contract or its performance. It is the interest of Carter to sustain its agreement as against Dille's claims; it is the interest of Delaney and Zephyr wholly to defeat his claims. Carter has no interest in the defeat of Dille's claims and so avers. There is no community of interest between Carter on the one hand and Delaney-Zephyr on the other requiring a realignment.

In *Dawson* v. *Columbia Avenue Savings Fund Company*, 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713 (1905), the plaintiff, a mortgagee, sought enforcement by specific

performance of a contract between the City of Dawson and the Dawson Waterworks Company to which contract the plaintiff was not a party. Whatever interest the mortgagee may have had in the performance of the contract, it was identical with that of the Waterworks Company. The case is not in point.

In *Blacklock* v. *Small,* 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70, (1888), the holder of a mortgage bond assigned to plaintiff. The assignor and defendants were citizens of the same state. It was held that jurisdiction was denied by 18 Stat. 470, Act of March 3, 1875, ch. 137, Section 1. The case is not in point.

Ashwander v. *Tennessee Valley Authority,* 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. ed. 688, 699 (1926), defines "cases of actual controversy" under the Declaratory Judgments Act as "a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding a hypothetical state of facts." The decision sustains the conclusion reached by the Court of Appeals that the complaint here stated a cause of action for declaratory relief.

In that conclusion the Court of Appeals is sustained by the following decisions: *Aetna Life Insurance Company* v. *Haworth,* 300 U. S. 227, 240, 57 S. Ct. 461, 464, 81 L. ed. 617, 621 (1937); *Maryland Casualty Company* v. *Pacific Coal & Oil Company,* 312 U. S. 270, 273, 61 S. Ct. 510, 512, 85 L. ed. 826, 828 (1941); *Atvater* v. *Freeman,* 319 U. S. 359, 364, 63 S. Ct. 1115, 1118, 87 L. ed. 1450, 1454 (1943); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 92, 119, 67 S. Ct. 556, 91 L. ed. 754, 769, 783; *United States* v. *Congress of Industrial Organizations,* 335 U. S. 106, 125, 68 S. Ct. 1349, 1358, 92 L. ed. 1849, 1862 (1948); *Nashville C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 260, 53 S. Ct. 345, 347, 77 L. ed. 730, 734 (1933).

V.

ARGUMENT.

The action is one in the nature of a suit to quiet title. Carter's rights and obligations under its contract with Delaney-Zephyr were clouded and rendered uncertain by the assertions of Dille. It could proceed with the performance of that contract at its own peril or upon its own interpretation of its rights or abandon it with the certainty of incurring an action by Delaney-Zephyr for damages for the breach. This situation created the cause of action which Carter here asserts. It was the direct and immediate result of the claims of Dille. Carter's controversy with Dille is whether its rights under its contract are superior to the claims of Dille. The several points of that controversy are succinctly set out in the stipulation submitted by Carter which Dille refused to execute (R. 62 to 64). In order to evade a trial on the merits of his claims, Dille subsequently, in open court, agreed to terms of the stipulations with certain modifications (R. 143-145). It plainly appears that Dille's acts gave rise to the filing of this action; that his conduct thereafter demonstrates a substantial controversy between him and Carter; and, that his admissions and waivers subsequently given were prompted solely by his purpose to evade a trial on the merits in the court below.

The action to which the petition refers as then pending in the State District Court of Garvin County, Oklahoma, was dismissed there for lack of jurisdiction on October 1, 1948, on the motions of the defendants in that action. Delaney's motion appears in this record at pages 34 to 36.

It seems obvious that Carter's controversy with Dille could not be properly presented unless both Delaney and Zephyr were made parties to the action. Their interest in

the subject-matter, while in no manner identical with the interest of Carter, made them necessary parties to a full and complete determination of the controversy between Carter and Dille.

The controversy between Carter on the one hand and Delaney-Zephyr on the other arose from the demands by the latter that they alone be recognized by Carter as having authority to limit expenditures and approve the drilling of additional wells and for payment of their shares of the income without diminution by reason of Dille's claims (R. 56 and 57). Carter could not accede to those demands except at its peril. These circumstances are set up in the complaint and show the basis for and the existence of the controversy between Carter and Delaney-Zephyr. The answers of those parties admit the truth of the circumstances alleged and the existence of that controversy. Those admissions do not identify the interests of Delaney-Zephyr with the interest of Carter.

We believe the decision in *Maryland Casualty Company* v. *Pacific Coal & Oil Company, et al.*, 312 U. S. 270, 61 S. Ct. 510, 85 L. ed. 826, (1941) is in point and controlling.

Dille's confessions did not settle the controversies existing between the parties, but merely relieved Carter temporarily from the peril of proceeding with the performance of the contract. The extent of Dille's rights against Carter, with respect to accountings, sales of products and distribution of income is not determined by Dille's admissions. He merely agreed to defer that determination until such time as he may be adjudged to be the owner of an interest in the leases and waived any claim occurring during the interim (R. 143 to 145). He sought by his confessions to evade a final determination of his claims of right both as

against Carter and as against these respondents in the courts below. Therefore, there was and still remains a justiciable controversy between Carter and all of the defendants.

Dille's motion to dismiss and his admissions, waivers and stipulations went to the merits of the action, not to the jurisdiction of the court. *The Fair* v. *Kohler Die & Specialty Company,* 288 U. S. 22, 25, 33 S. Ct. 410, 57 L. ed. 710, 717 (1913); *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305-308, 44 S. Ct. 96, 98-99, 68 L. ed. 308, 314, 315 (1923); *Bell* v. *Hood,* 327 U. S. 678, 682, 66 S. Ct. 773, 776, 90 L. ed. 939, 943 (1946).

Since the complaint stated a cause of action cognizable in the court below, it had jurisdiction to try and determine the issues between the co-defendants. *Rickey Land & Cattle Company* v. *Wood,* 218 U. S. 258, 263, 31 S. Ct. 11, 54 L. ed. 1032, 1038 (1910); *Mitchell* v. *Maurer,* 293 U. S. 237, 243, 55 S. Ct. 162, 164, 79 L. ed. 338, 342 (1934); *Mathis* v. *Ligon, et al.,* 37 F. (2d) 635, (C. C. A. 10, 1930) certiorari denied, 282 U. S. 846, 51 S. Ct. 26, 75 L. ed. 751.

And that jurisdiction is not lost by the subsequent admissions, confessions and stipulations of Dille. *Kirby* v. *American Soda Fountain Company,* 194 U. S. 141, 24 S. Ct. 619, 48 L. ed. 911 (1904); *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 607, 610, 46 S. Ct. 367, 70 L. ed. 750, 756 (1926).

The respondents, W. A. Delaney, Jr., and Zephyr Drilling Company, respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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